In the High Court of Judicature at Madras

Dated: 14-03-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.280 of 1997

K.M.Lingan ..Appellant (Plaintiff)

v

1.Lakshmiammal(died)
2.O.B.Nanjan
3.Halliammal
4.Mani

RR 3 and 4 are brought on record
as L.Rs of the deceased R1 vide
CMP No.15495 of 1998 dated 21.9.1999
by KNJ ..Respondents (Defendants)

The second appeal is filed against the judgment and decree dated 26.9.1996 made in A.S.No.36 of 1996 on the file of the Court of Subordinate Judge, Udhagamandalam, reversing the Judgment and decree dated 22.4.1996 passed in O.S.No.178 of 1995 on the file of the Court of District Munsif, Kothagiri.

For Appellant : Mr.K.M.Santhanagopal

For Respondents : Mr.N.Anand Venkatesh-R2 to R4.
R1-Died.

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JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.36 of 1996 on the file of the Court of Subordinate Judge, Udhagamandalam. The plaintiff filed O.S.No.178 of 1995 on the file of the Court of District Munsif, Kothagiri for bare injunction has obtained a decree in his favour before the trial Court. Aggrieved by the findings of the learned trial Judge, the defendants have preferred an appeal in A.S.No.36 of 1996 before the Subordinate Judge, Udhagamandalam who has allowed the appeal thereby setting

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aside the decree and Judgment of the trial Court, which necessitated the plaintiff to prefer this second appeal.

2. The short facts of the averments in the plaint relevant for the purpose of deciding this appeal sans irrelevant particulars are as follows:
The plaintiff's late paternal grand father T.Kulla Maistry executed a settlement deed dated 5.11.1958 in favour of the plaintiff and his brother Rangaswamy and his other cousins namely, Rangaswamy, Manian, Mathan, T.K.Ramaswamy, Devaraj and Manian's son T.K.Lakshmanan for an extent of 13 acres 92 cents in R.S.No.378/1, 402, 254/1, 271/1, 228/3, 377/1B, 377/1A of Kengarai Village, Kotagiri Taluk. At the time of execution of settlement deed, the plaintiff and his first cousins were minors, the property in question was looked after jointly by their respective guardians. After the plaintiff and his first cousin attained majority, the property in question was orally partitioned between the sharers and in the oral partition, the plaintiff got an extent of 1 acre 16 cents in R.S.No.254/1D, subdivided from original survey number of 254/1 with specific boundaries.

2a) The plaintiff is in possession and enjoyment of the land extending 1.16 acres in R.S.No.254/1D planted with Tea plants and has been in continuous and uninterrupted possession and enjoyment for the past 25 years. The plaintiff is paying land tax to the Revenue authorities and the land tax receipts for the year 1993 and the chita extract are also produced along with the plaint. The defendants are making an attempts to grab at the suit property. On 22.12.1993, when the defendants tried to trespass into the suit property which was prevented by the plaintiff by his timely intervention. To prevent further attempt of trespass, the plaintiff has filed the suit.

3. The defendants 1 and 2 have filed a joint written statement contending as follows:
Late T.Kulla Maistry of Thaddamanaihatty in Kengarai Village, Kotagiri Taluk and his wife late Tmt. Kali ammal alias Kami Ammal had nine children(6 sons and 3 daughters) They are 1) T.K.Mathan, 2) T.K.Kaman, 3)T.K.Krishnan, 4) T.K.Ramaswamy, 5) T.K.Nanjan,6) T.K.Lakshmanan,7) Tmt.Giriji Ammal,8) Tmt.Ponni ammal and 9) Tmt.Lakshmi ammal(second defendant). Late Kali ammal alias Kami Ammal died intestate in or around the year 1958 and late T.Kulla Maistry died in or around the year 1960. The alleged settlement deed dated 5.11.1958 by Late T.Kulla Maistry in favour of the plaintiff and others are not a valid document. The entire properties to an extent of 13 acres 92 cents in various survey fields in both Kangarai and Denad Villages of Kotagiri Taluk originally belonged to Late Tmt.Kali ammal alias Kami ammal, wife of late Kulla Maistry being her self acquired properties. The said Kali ammal alias Kami ammal died intestate in the year 1957, late T.Kulla Maistry had no title to make the settlement deed dated 5.11.1958 on which the present suit is

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based. Late Kulla Maistry could at best settle only his share of 1/10th of his late wife's properties. Therefore, the present suit is not sustainable in law on the basis of the settlement deed dated 5.11.1958.

3a) Even if the alleged settlement deed is true, the description of the suit property is erroneous. In the alleged deed of 1958 , it is stated that the plaintiff and his brother would get an extent of 2 acres 32 cents out of various survey fields jointly in both Kengarai and Denad Villages. In the absence of positive evidence with regard to the alleged oral partition, the suit is liable to be dismissed in limine on the ground of erroneous description of the schedule of properties. The chitta extracts refer to patta No.172, but there is nothing on record to show that the patta refers to the suit property. The boundaries given for the suit property are imaginary. The second defendant being one of the legal heirs of Late Kaliammal and T.Kulla Maistry , she is entitled to get 1/9th share of the total extent of 13 acres 92 cents and an extent of 10 acres purchased by her and she is in possession and enjoyment of a total extent of 1.64 2/3 acres in both the villages. The plaintiff is not in exclusive possession and enjoyment of the suit property and the land tax receipts refer to only for fasli 1402. Hence the suit is liable to be dismissed with costs.

4. On the above pleadings, the trial Court had framed two issues . Before the trial Court, the plaintiff has examined himself as P.W.1 and exhibited Exs A1 to A4. Neither oral nor documentary evidence was let in on the side of the defendants. After going through the documentary and oral evidence let in by both parties, the learned trial Judge has come to a conclusion that the plaintiff is entitled to get an order of injunction and accordingly decreed the suit with costs. Aggrieved by the findings of the learned trial Judge, the defendants have preferred an appeal in A.S.No.36 of 1996 before the learned subordinate Judge, Udhamandalam. The learned first appellate Judge has allowed the appeal thereby setting aside the decree and judgment of the trial Court. Hence the second appeal by the plaintiff.

5. The substantial questions of law involved in this appeal are

i) Whether the first appellate Court was right and justified in law in reversing the Judgment and decree passed by the trial Court granting decree for permanent injunction in favour of the appellant /plaintiff, in the absence of any evidence let in by the defendants, that too having regard to the plea taken in the written statement?

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2. Whether the first appellate Court was correct in setting aside the judgment and decree passed by the trial Court without having regard to the scope of the suit which is filed one for permanent injunction and in proceeding to dispose of the appeal as if the suit is one filed for declaration as well?

5a) The following additional questions of law are framed for consideration on 26.2.2007 on application.

" 1. Whether the Judgment of the lower appellate Court is void and unsustainable for non compliance with the mandatory provisions contained in Order 41 Rule 31 CPC and liable to be set aside?

2. Whether the settled possession of the appellant has to be taken into consideration on the evidence adduced and whether the appellant is entitled for protection and grant of an order of injunction against the respondents as laid down by the Honourable Apex Court in the case of Rame Gowda(D) by Lrs-vs- M.Varappa Naidu(D) by Lrs. And another reported in 2004(3) L.W.143)?

6. The Points:

The learned counsel appearing for the appellant would draw the attention of this Court to the Judgment of the first appellate Court by saying that there was no proper point for determination was framed by the first appellate Court to dispose of the first appeal and that on that ground alone the first appellate Court's Judgment is liable to be set aside. To substantiate this contention, the learned counsel would rely on the provisions of Order 41 Rule 31 CPC which reads as follows:

" The Judgment of the Appellate Court shall be in writing and shall state-
(a) the points for determination;
(b) the decision thereon;
(c) the reasons for the decision; and
(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

The learned counsel for the appellant would contend that the provision under Order 41 Rule 31(a) CPC has been violated by the learned first appellate Judge and that the learned Judge has framed the point for determination as follows:

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"இம்மேல் முறையீட்டில் தீர்மானிக்கப்பட வேண்டிய பிரச்சனை யாதெனில் இம்மேல்முறையீடு அனுமதிக்க தக்கதா என்பதேயாகும்.

The learned counsel appearing for the appellant would contend that the first appellate Court has failed to apply his mind with regard to what are all the points to be decided in the first appeal. Simply it has stated that whether the first appeal is liable to be allowed or not which is against the principles of law laid down by this Court in Chinnammal-vs- M.Ramasamy Naicker and another(2002) 3 M.L.J.501) wherein it has been observed as follows:

" After careful consideration of the rival submissions and the scrutiny of the available materials what are all required to be stated is that the judgment of the First Appellate Court has got to be set aside in view of the non-compliance of the mandatory provisions under O.41 Rule 31 CPC. The First Appellate Court instead of setting the points for determination has stated as follows:

"மேல் முறையீட்டில் தீர்வு காண வேண்டிய பிரச்சனையாதெனில் "இம்மேல்முறையீடு அனுமதிக்கக் கூடியதா?" என்பதேயாகும்.

After going through the Judgment of the First Appellate Court , this Court may hasten to state the Judgment under challenge is defective in that the learned Subordinate Judge has not followed the above provisioon under O.41 Rule 31,CPC The first appellate Court has not raised the points for determination as required under the aforestated mandatory provisions and not focused its attention on the specific and rival contentions which arose for decision. This Court had an occasion to consider such a situation in a case reported in Palanisami Pillai.v.The Commissioner, H.R and C.E. Madras(1997) 1 CTC 562 wherein it has b een held as follows:

The object of O 41 Rule 31, C.P.C. In making it incumbent upon the appellate Court to raise the points for determination and to state reason for the decision is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival conentions which arise for determintion as also to offer the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they seem fit, and are so adverse, the right of second appeal conferred by Sec.100, CPC. On a perusal of the Judgment of the learned single Judge, it appears to us that the reasons for his

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findings would not satisfy O.41 C.P.C. This Court being the first appellate Court, and being the final Court of facts, it is incumbent on it to consider all the evidence adduced by the parties in the case."

The facts of the abovesaid case exactly applies to the present facts of the case in all four corners.

7) The learned first appellate Judge has also not given an opportunity to the respondent to place his defence before the Court is also seen from the observation at Paragraph 12 of his Judgement. The learned first appellate Judge has observed that when the case was posted on 12.9.1996, there was no representation for the respondent and the respondent's counsel was also absent and the respondent was also absent and after hearing the appellant's counsel, the Judgment has been pronounced on merits. It is pertinent to note that the respondent has filed a petition to set aside the exparte order in IA.No.297 of 1996 but on the date of disposal of the first appeal on 26.9.1996, the said I.A.No.297 of 1996 filed by the respondent was also dismissed. The plight of the plaintiff was considered by this Court in CRP No.2049 of 1996, the revision preferred against the order passed by the first appellate Judge in I.A.No.297 of 1996. After hearing both sides, the Civil revision petition was allowed by this Court granting interim injunction in favour of the plaintiff and there is no counter filed in C.R.P.No.2049 of 1996 and the injunction has been made absolute by this Court.

8. Now coming to the merits of the case, the plaintiff has filed the suit for injunction in respect of 1 acre 16 cents in Kengarai Village re-surveyNo.254/1D. In the plaint, the plaintiff has given four boundaries for the above said 1 acre 16 cents. To prove his possession, the plaintiff has entered into the box to depose his case and he has also exhibited Exs A1 to A4. The learned first appellate Court has observed that the plaintiff has failed to correlate the patta No.172 to re-survey No.254/1D, without looking into the exhibits produced by the plaintiff. Ex A1 dated 5.11.1958 is the settlement deed executed by T.Kulla Maistry in favour of the plaintiff, his brother and his cousin brothers. At the time of Ex A1, the plaintiff, K.M.Lingan was a minor. "A" schedule to Ex A1 was settled in favour of the plaintiff K.M.Lingan and his brother Rangasamy. 2 acres 32 cents is the extent of the property in Survey No.254/1 at Kengarai Village was settled in favour of the plaintiff and his brother. Ex A2 is the copy of chita adangal extract for fasli 1402 which shows that survey No.254/1 has been subdivided into 254/1D and the patta No.172 has been issued in favour of 52 persons. Serial No.50 relates to K.M.Lingan, the plaintifif/appellant herein.

9. The learned counsel appearing for the respondents would contend that the first defendant Lakshmiammal is also a joint pattadar and her name figures at Sl.No.27. Except the contention of

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the learned counsel for the respondents that the first defendant Lakshmiammal is also a joint pattadar for Survey No.254/1D, there is absolutely no evidence let in in this case to show that Lakshmiammal in Sl.No.27 to Ex A2 and the first defendant are one and the same person. Even the first defendant Lakshmiammal had not chosen to enter into the box to prove this claim.

10. The learned counsel appearing for the appellant relying on Rajbahadur Sharma (dead) through Lrs-v- Union of India and others (1998) 9 Supreme Court Cases,458) and contended that to prove that the plaintiff is not in possession of the plaint schedule property and that the first defendant Lakshmiammal is also a joint pattadar, the first defendant has not even entered into the box to prove the same. Order 8 Rule 3 CPC mandates that if there is any denial by the party to the suit, then it must be specific. The said provision of law runs as follows:

> "It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation or fact of which he does not admit the truth, except damages".

The exact observation in the abovesaid dictum relied on by the learned counsel appearing for the appellant runs as follows:

> "Learned counsel appearing for the appellant submitted that though it was brought to the notice of the Tribunal that the appellant was not at fault in not joining at the transferred place, without giving any finding on that, the Tribunal has deprived the appellant of the salary for the period in question. He also brought to our notice that there was a specific plea, namely, that the appellant could not join at the transferred place in the absence of relieving order and necessary passes. The respondents never came forward to deny that assertion of the appellant. In other words, while the appellant was prepared to join the duty it was the administration which disabled the appellant to join the duty and, therefore, the appellant cannot be blamed".

11. The third document on which the plaintiff/appellant placed his reliance to prove his possession in respect of the suit property is Ex A3,the document evidencing the payment of land tax by the plaintiff for fasli 1402. The plaintiff has paid land tax for lands comprised in patta No.172. The learned counsel appearing for the respondents would contend that there is no correlation for this patta 172 to the suit Survey No.254/1D. But in Ex A2, the copy of the chita extract for fasli 1402 itself, it has been clearly stated that patta

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No.172 stands in the name of 52 persons in respect of Survey No.254/1D at Kengarai Village and the plaintiff is one of the pattadars to Survey No.254/1D. Ex A3 is dated 17.1.1993. ie., prior to date of filing of the suit. Ex A4 is the tax receipts for fasli 1402 which is subsequent to the suit. The learned counsel appearing for the appellant would contend that once the plaintiff has produced sufficient evidence both oral and documentary to show that he is in possession of the plaint schedule property then it is the duty of the Court to protect his possession by way of granting an order of injunction. For this proposition of law,the learned counsel appearing for the appellant would rely on Rame Gowda (D) by Lrs-vs-M.Varadappa Naidu (D) by Lrs(2004-3 L.W.143) . The relevant observation in the abovesaid ratio decidendi runs as follows:

> "When the facts disclose no title in either party, possession alone decides. The court quoted Loft's maxim - 'Possessio contra omnes valet praeter eur cui his sit possession is (He that hath possession hath right against all but him that hath the very right)' and said. "A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time." In M.C.Chockalingam and Others Vs. V.Manickavasagam and Others - (1974) 1 SCC 48, this Court held that the law forbids forcible dispossession, even with the best of title. In Krishna Ram Mahale (dead) by his Lrs. Vs. Mrs.Shobha Venkat Rao - (1989) 4 SCC 131, it was held that where a person is in settled possession of property, even on the assumption that he had no right to remain the property, he cannot be dispossessed by the owner of the property except by recourse to law. In Nagar Palika, Jind Vs. Jagat Singh, Advocate-(1995) 3 SCC 426, this Court held that disputed questions of title are to be decided by due process of law, but the peaceful possession is to be protected from the trespasser without regard to the question of the origin of the possession. When the defendant fails in proving his title to the suit land the plaintiff can succeed in securing a decree for possession on the basis of his prior possession against the defendant who has dispossessed him. Such a suit will be founded on the averment of previous possession of the plaintiff and dispossession by the defendant.
>
> It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession

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and in order to protect such possession, he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possession by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to Munshi Ram and Others Vs. Delhi Administration- (1968) 2 SCR 455, Paran Singh and Others Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Others Vs. State of Uttar Pradesh - (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram and Others's case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the

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land, and in such a case, unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case(supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The "settled possession" must be (i) effective(ii) undisturbed and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase settled possession does not carry any special charm or magic in it. Nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of settled possession.

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the true

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owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession in the case of cultivable land would be whether or not the trespasser, after having taken possession had grown any crop. If the crop had been grown by the trespasser then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

11a) For the same proposition of law the learned counsel for the appellant relying on AIR 1972 S.C.2299 M.Kallappa Setty.. Appellant-v-M.V.Lakshminarayana Rao ... respondent, would contend that Plaintiff on the strength of his possession can resist intereference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession.

12. The learned counsel appearing for the appellant relying on Sara Veeraswami alias Sara Veerraju-vs- Talluri Narayya (deceased) and others(AIR (36) 1949 Privy Council 32) and contended that the first appellate Court ought not to have been interferred with the findings of the trial Court in respect of question of fact without any evidence neither oral nor documentary. The exact observation in the abovesaid dictum runs as follows:

"But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage(which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given ."

The learned trial Judge after scanning the evidence both oral and documentary has come to a conclusion that the plaintiff has proved his possession in respect of the suit property. But the first

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appellate Court without adverting his mind to the fact that the plaintiff has correlated the suit survey Number with the patta No.172 issued in favour of him under Ex A2 has erroneously held that the plaintiff has not even correlated the suit survey number property to the patta No.172 without considering Ex A2.

13. For the same proposition of law, the learned counsel appearing for the appellant would rely on another ratio in Sarju Fershad Ramdeo Sahu-vs-Jwaleshwari Pratap Narain Singh(AIR (38) 1951 Supreme Court 120) wherein it has been held that how the appellate Court shall appreciate the evidence has been dealt with. The observation of the Honourable Apex Court at page 121 in Paragraph 7 runs as follows:

> " The rule is and it is nothing more than a rule of practice that when there is conflict or oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.Vide Lord Atkin's observations in W.C.Macdonald.v.FredLatimer,AIR (16)1929 P.C.15 at P.18:(112 I.C.375)".

14. The learned counsel appearing for the appellant would contend that since the first appellate Court has not properly framed the point for determination, that is not a ground for remanding the matter to the first appellate Court. In support of his contention, the learned counsel for appellant would rely on Ashwinkumar K.Patel-v-Upendra J.Patel and others(AIR 1999 Supreme Court 1125). The relevant observation of the Honourable Apex Court is as follows:

> "In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or

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> modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980(and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary."

15. The cause of action column to the plaint, the plaintiff has specifically averred that on 22.12.1993, the defendants have made an attempt to trespass into his property and tried to dispossess him. To prove the possession, the plaintifif has filed Exs A1 to A4. Against this piece of evidence, there is absolutely no contra evidence let in by the defendants. Under such circumstances, following the principles laid down in Ashwinkumar K.Patel-v-Upendra J.Patel and others(AIR 1999 Supreme Court 1125), I am of the view that the case need not be remanded to the first appellate Court and the plaintiff is entitled to his remedy in this appeal.

16. Finally, the learned counsel appearing for the appellant would contend that the first appellate Court ought to have allowed I.A.No.297 of 1996 filed by the plaintiff before the first appellate Court to reopen the appeal and to give an opportunity to his counsel to make his submissions,but that was also dismissed without giving opportunity to the respondent/plaintiff. The first appellate Court dismissed the same which is against the principles of natural justice. For this proposition of law, the learned counsel appearing for the appellant would rely on a dictum reported in Choorampulikkal Assan Kutty and others-vs-Ramanalukkal Kunhi Moiden Kutty (1956 MLJ 496) wherein it has been observed by the learned Judge of this Court as follows:

> "Where an advocate reports no instructions, it can, in the large majority of cases, be presumed that the clients had made no response to more than one call for the balance of his fees, and in such cases a final opportunity may well be afforded in the form of a Court direction to the advocate to send a registered letter to his defaulting clients, that he will report no instructions to the Court if the clients do not instruct him or themselves attend Court on the adjourned date. A human approach of this kind by Courts instead of disposing of appeals ex parte and applications to rehear them too strictly in accordance with Order 41 rule 21 Civil Procedure Code will do something to bridge the gulf between the urban lawyers and the village".

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17. So viewed from any angle, the findings of the learned first appellate Court cannot be said that it is loaded without perverseness . Under such circumstances, I am of the view that the findings of the first appellate Court iin A.S.No.36 of 1996 on the file of the Subordinate Judge, Udhagamandalam is liable to be set aside for the reasons stated in the earlier paragraphs of this Judgment.

18. In fine, the appeal is allowed setting aside the decree and Judgment of the first appellate Court in A.S.No.36 of 1996 on the file of the Court of Subordinate Judge, Udhagamandalam thereby restoring the Judgment of the trial Court in O.S.No.178 of 1995 on the file of the Court of District Munsif, Kotagiri with costs through out.

Sg

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Asst.Registrar

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Sub Asst.Registrar

To
1.The Subordinate Judge, Udhagamandalam

2. The District Munsif, Kotagiri.

3. The Record Keeper, VR Section, High court Madras

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